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JAMES WARREN SMITH JR.

COUNTY ATTORNEY
FRIO COUNTY

Opinion Committee

February 19, 1998

The Attorney General of Texas
Supreme Court Building
ATTN: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548
CERTIFIED MAIL NO. P 440 930 923

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RQ-1096

Re: Request for attorney general's opinion pursuant to V.T.C.A., Government Code, Section 402.043

Dear Sir/Ma'am:

In accordance with referenced statute, I am requesting an attorney general's opinion. I will first state the facts, then pose the question, the law that I think is applicable, my argument and conclusion.

FACTS: Juvenile Probation Office's Argument and Conclusion, and Final Comment.

The Frio County Juvenile Probation Office placed a juvenile on deferred prosecution probation pursuant to V.T.C.A., Texas Juvenile Justice Code, (JJC) Section 53.03 for six months (after that office conducted a preliminary investigation pursuant to section 51.01 of the JJC and determined that further proceedings were necessary) for resisting arrest, (Texas Penal Code, Section 38.03), on February 26, 1997, and with the agreement of the parents and myself. There is no alternative referral plan in place in Frio County's juvenile system nor does the original offense come within the purview of Section 53.01(d), JJC.

The 6-month deferred prosecution probation period expired on or about August 26, 1997, at which time the informal supervision was terminated.

However, on September 5, 1997, this same juvenile was again taken into custody for the offenses of public intoxication and evading arrest (Texas Penal Code, Sections 49.02 and 38.04, respectively).

QUESTION:

May the Juvenile Probation Office request my Office to "move for adjudication" of the prior offense of resisting arrest even though the six month deferred prosecution had expired? (It is understood that the juvenile may be referred to this Office and prosecuted in Frio County Court, Sitting as a Juvenile Court, in a detention hearing (but only after the two conditions stated in Section 53.01 [a] [1], [2], JJC, have been found in a preliminary investigation conducted by the Juvenile Probation Office which has been designated by the aforementioned juvenile court judge pursuant to JJC, Section 53.01 [a])).

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APPLICABLE LAW:

Citing Texas Juvenile Law, Fourth Edition, and its 1997 Supplement, by Professor Robert O. Dawson in Chapter 5 of the main treatise, pp. 59-62, there is the following language:

B. DEFERRED PROSECUTION

A major function performed by intake is implementing the intake conference and adjustment (also called informal probation) option authorized by Section 53.03. By amendment in 1995, this disposition was substantially modified to reflect power-sharing with the prosecutor's office. Its name was also changed from intake conference and adjustment to deferred prosecution to reflect the more central role of the prosecutor in the process.

"Deferred prosecution involves two separate matters: deciding what cases should be handled by deferred prosecution and actually administering the deferred prosecution counseling process.

"Definition. Deferred prosecution is an alternative to seeking a formal adjudication of delinquent conduct or conduct indicating a need for supervision. It is essentially a six month period of probation. Many of the cases referred to the juvenile court are not of sufficient seriousness to the child or the community to justify pursuing the juvenile process through to formal adjudication and disposition hearings. Furthermore, in many counties there are insufficient resources to pursue all cases through the formal court hearings, even if that were regarded as desirable.

"Authority to Use Deferred Prosecution. Prior to 1995 amendments, each juvenile court judge had the sole power to decide how intake adjustment was to be employed. The 1995 amendments require that the power to use deferred prosecution be shared with the prosecutor.

"Section 53.03(e) authorizes the prosecution to place any child on deferred prosecution in any case. The only restriction is the implicit one that the child must be placed on deferred prosecution before jeopardy has attached at the beginning of the adjudication hearing unless the child and his or her attorney have explicitly consented to a declaration of a mistrial after jeopardy has attached.

"Section 53.03(e) also prohibits the probation department from placing a child on deferred prosecution in a case that Section 53.01(d) requires to be forwarded to the prosecutor. In the absence of an alternative referral plan, a probation officer could not place a child on deferred prosecution whose current referral is for a felony, a misdemeanor involving violence to a person, or a misdemeanor weapons offense. If there is an alternative referral plan in place, the probation officer would be unable to place on deferred prosecution a child whose case is required to be referred to the prosecutor under that plan.

"If intake has referred a case to the prosecutor and the prosecutor has determined that probable cause exists but that the filing of a petition is not desirable, Section 53.012 permits the prosecutor to return the case to the probation department 'for further proceedings.' Under those circumstances, probation may place the child on deferred prosecution because the prosecutor returned the case to probation. In such a circumstance, the deferred prosecution is in effect ordered by the prosecutor as authorized by 53.03(e) and probation is functioning as the prosecutor's agent. The agency relationship is reflected by the requirement of 53.012(c) that probation must 'refer a child who as been returned to the department ... and who fails or refuses to participate in a program of the department to the prosecuting attorney for review of the child's case and determination of whether to file a petition.'

"Finally, 53.03(e)(2) permits probation to place a child on deferred prosecution who has previously been adjudicated for a felony only with the prosecutor's written consent. Thus, even if the current referral is for an offense that under the default provision of 53.01(d) or the terms of an alternative referral plan is not required to be referred to the prosecutor, intake may not employ deferred prosecution without the prosecutor's written consent if the child has a prior felony adjudication.

"Probable Cause Required. Section 53.03(a) requires that the preliminary determinations discussed earlier in this chapter must be made before a child can be placed on deferred prosecution. Thus, deferred prosecution can be used only if there is a finding of probable cause to believe the child engaged in delinquent conduct or conduct indicating a need for supervision. That determination must be made by intake or by the prosecutor if referral to the prosecutor is required by a local alternative plan or by the default provision.

"Deferred prosecution cannot be used to deal with whose cases that the State is clearly unable to prove in court. Those cases should be dismissed upon a finding of no probable cause by intake or by the prosecutor.

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"Consent Required. Section 53.03(a)(2) requires that deferred prosecution must be based upon the consent of the child and his or her parent, guardian, or custodian 'with knowledge that consent is not obligatory.' There is no requirement that the child be represented. Consent by counsel is specifically omitted from Section 53.03(a)(2) and, therefore, is an exception to the general requirement of Section 51.09(a) that defense counsel must concur in any waiver of rights by a child.

"Of course, if the child has retained or appointed counsel, he or she has the right to advice of that attorney regarding the decision whether to accept deferred prosecution; further, many cases of deferred prosecution will be negotiated for the child with the prosecutor by the child's attorney.

"Since deferred prosecution involves probation without adjudication, it is important to protect the child's right to proceed to court on the case to have a judge or jury decide the question of guilt or innocence. Section 53.03(a)(3) gives the child and his parent guardian or custodian the right to 'terminate the deferred prosecution process at any point and petition the court for a court hearing in the case.' Further, they must be informed of that right at the time the child is placed on deferred prosecution.

"Violations of Deferred Prosecution. Although the child may terminate the deferred prosecution process at any time in favor of a court hearing, the same is not true of the State. The practice is to impose conditions on deferred prosecution that are similar to those used for formal probation. Thus, by employing those conditions the State is promising that it will not file a petition or proceed with a petition that has already been filed as long as the child abides by those conditions. As long as the child is not in violation of those conditions, the deferred prosecution process cannot be disturbed by the State.

"Section 53.03(f) provides that '[t]he probation officer or other officer designated by the court supervising a program of deferred prosecution for a child under this section shall report to the juvenile court any violation by the child of the program.' Section 53.02(2) provides that '[t]he juvenile probation department shall promptly refer a child who has been returned to the department [by the prosecutor] and who fails or refuses to participate in a program of the department to the prosecuting attorney for review of the child's case and determination whether to file a petition.

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"Read literally, those two sections, as applied to deferred prosecution, would require probation to report all violations to the court but to report to the prosecutor only those violations in the cases that were returned to probation from the prosecutor under Section 53.012(b). However, because the decision whether to file a court petition is exclusively within the power of the prosecutor to make, violations of all deferred prosecution programs should be reported to the prosecutor as well as to the court.

"If the prosecutor thinks it is appropriate, the case may be brought into court by filing a new petition or by setting a court hearing date on a petition that has already been filed. It is important to note that this is in no sense a revocation of the deferred prosecution, but rather a decision to proceed to court with the original case because the effort at informal probation has been filed.

"Time Limits. The period for deferred prosecution is set by Section 53.03(a) at 'a reasonable period of time not to exceed six months.' If deferred prosecution has been successful at the end of the six months, or lesser set period, the child must be discharged from probation. The case should be closed and any petition that has been filed should be dismissed. The child must also be informed of the right to sealing of the records as required by Section 58.003(I). See Chapter 15 for a discussion of sealing of records."

COMPARISON WITH ANALOGOUS STATUTE IN TEXAS CODE OF CRIMINAL PROCEDURE:

C.C.P., Articles 45.54, 42.111 and 42.12, Section 5 are somewhat comparable statutes pertaining to "deferral of proceedings" (with respect to the first two articles) and deferred adjudication to the last article.

It is fundamental in the criminal law context that failure to move for adjudication of guilt or issue a capias for arrest prior to the expiration of the deferred adjudication probationary period by the state or on court's own motion prior to the expiration of the period of probation (see: Polak v. State, 907 S.W. 2d 664, CA-San Antonio, no writ hist. (1995); Hardman v. State, 614 S.W. 2d 123, Crt. Crim. App. - Pn. 3 (1981); Garza v. State, (1985) 695 S.W. 2d 726, CA-Dallas (1985) - distinguishing Hardman; Garza vs. State, Crt. Crim. App. 725 S.W. 2d 256 - en banc (1985) Shahan v. State, 792 S.W. 2d 101, Crt. Crim. App. - en banc (1990), the court then loses its jurisdiction over the case, and thus there can be no revocation of probation.

MY ARGUMENT AND CONCLUSION:

Drawing an analogy with the code of criminal procedure (*supra*), I would conclude that the deferred prosecution in the juvenile's case had expired; and, therefore the aforementioned juvenile court lost its jurisdiction to consider the original offense of resisting arrest at a subsequent detention hearing.

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JUVENILE PROBATION DEPARTMENT'S ARGUMENT AND CONCLUSION:

Professor Dawson in his treatise states on page 60 (as quoted above) in part:

AUTHORITY TO USE DEFERRED PROSECUTION,

"Section 53.03(e) authorizes the prosecutor to place my child on deferred prosecution in any case (which was agreed to by me, supra). The only restriction is the implicit one that the child must be placed on deferred prosecution before jeopardy has attached at the beginning of the adjudication hearing unless the child and his or her attorney have explicitly consented to a declaration of a mistrial after jeopardy has attached. (The juvenile was not represented by an attorney at any stage of the deferred prosecution proceedings).

*****"

(parenthetical comments, mine).

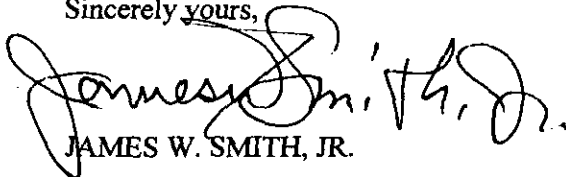
The Juvenile Probation Department's argument is, therefore, that since there has been no adjudication of the original resisting arrest charge (the offense that was the subject of the deferred prosecution), this charge can be prosecuted by my office, regardless of the expiration of the six month deferred prosecution term since no jeopardy had attached.

FINAL COMMENT:

There has been no petition for a delinquency hearing filed in this case pertaining to the resisting arrest charge and none will be filed until we have an opinion from the attorney general's office. The separate cases of public intoxication and evading arrest will be considered on their own merits as to whether my Office will go forward with their prosecution.

Thank you in advance for your assistance in this matter.

Sincerely yours,



JAMES W. SMITH, JR.

JWSJr/ymm

xc: Files

xc: Ms. Jenny Shafer

Chief, Frio County Juvenile Probation Officer

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